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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

WELENKEN HIMMELFARB & CO. **PETITIONERS**
WHAYNE HOUGLAND

v.

JULIA V. SPARROW HOLT (ATCHISON)
ON BEHALF OF HERSELF AND ALL
OTHERS SIMILARLY SITUATED **RESPONDENTS**

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 13, 1985

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit may substitute its judgment for that of the District Court in considering the propriety of a Rule 41(b) dismissal?

2. In view of the congested dockets of the federal courts in general, and the conflict that now exists among the circuits with respect to utilizing dismissal as a sanction, should this Court establish guidelines for the dismissal of actions under Rule 41(b) for failure to prosecute actions diligently?

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OPINIONS BELOW

The unreported opinions of the United States Court of Appeals for the Sixth Circuit and the District Court, Western District of Kentucky, are attached hereto as Appendix A and B respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 11, 1985. No petition for a rehearing was filed. This petition is being filed within 90 days of the date of the Sixth Circuit's Judgment, February 11, 1985.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The District Court had jurisdiction over the proceeding pursuant to §27 of the Securities Exchange Act of 1934; 15 U.S.C. §78(aa).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Federal Rules of Civil Procedure

Rule 41(b):

> Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

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JULIA V. SPARROW HOLT (ATCHISON) ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED — RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Welenken Himmelfarb & Co. ("Welenken Himmelfarb") and Whayne Hougland ("Hougland") respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on February 11, 1985.

STATEMENT OF THE CASE

This action involves allegations of state and federal securities violations and common law fraud.

The original Complaint was filed by Respondent, Julia V. Sparrow Holt (Atchison) on February 2, 1973, over twelve years ago. On October 1, 1973, Respondent moved to file an Amended Complaint and to maintain the action as a class action. The District Court allowed Respondent to file the Amended Complaint which joined Petitioners, Welenken Himmelfarb and Hougland, as defendants on November 20, 1973. Respondent's Amended Complaint named approximately 35 parties as defendants.

The claims asserted against Petitioner, Welenken Himmelfarb, a firm of certified public accountants located in Louisville, Kentucky, alleged deficiencies in certain financial statements prepared in August of 1969. These statements were claimed

to have been consolidated in a prospectus for the offering of stock which became effective on October 17, 1969.

With respect to Petitioner, Hougland, the Amended Complaint alleged that as an attorney he (i) participated in the preparation of various legal documents and (ii) passed upon legal matters in connection with a prospective merger which Respondent alleges to have been fraudulent.

In the nine months following Respondent's tender of the Amended Complaint in October, 1973, the Respondent did nothing whatsoever to prosecute the action. The District Court on its own motion scheduled and held a pre-trial conference on July 2, 1974. At the pre-trial conference, the District Court scheduled a hearing for November 12, 1974 to hear arguments on Respondent's October 1, 1973 motion to maintain the action as a class action.

Following the July, 1974 pre-trial conference, Respondent undertook no dis-

covery and, again, made no effort to prosecute the case. To the contrary, Respondent moved in October of 1974 to continue the November hearing. The District Court granted the continuance and remanded the motion. Thus, Respondent's only action in this twelve-month period was to postpone a decision on its own motion which had been pending for one year.

The case lay dormant for one and 1/2 years until March 22, 1976, when Respondent renewed the remanded class certification motion. In addition, for the first time in three years, Respondent made a discovery request and served Interrogatories on Petitioner, Hougland on March 19, 1976.

After this slight flurry of activity in March of 1976, Respondent reverted to inactivity. Despite Respondent's passiveness in prosecuting the case, the District Court sustained Respondent's motion for class certification without the benefit of an evidentiary hearing on September 7, 1976.

Even after the class was certified, Respondent made no real effort to move the case toward trial. Instead, Respondent allowed eight months to elapse, without taking any discovery or any other action to prosecute the case. On March 31, 1977, one year after Respondent's previous discovery request, Respondent managed to schedule a single desposition for April 12, 1977. However, Respondent cancelled the scheduled deposition on or about April 7, 1977.

Because the only discovery request made by Respondent during 1977 was withdrawn, the three-year period between March 19, 1976 and February 9, 1979 passed without Respondent taking a single step to prosecute the case. In spite of Respondent's lackadaisical conduct, the case progressed, but only because, on February 9, 1979, the District Court once again stepped in and scheduled a pre-trial conference to be held June 4, 1979. Prior to this conference,

Judge Rhodes Bratcher, to whom the case had been assigned six years before, died. In May of 1979, this action was transferred to the Honorable Charles M. Allen. The scheduled pre-trial conference was held on June 4, 1979 and at that time Paul Gudgel was removed as counsel for the Respondent and present counsel, J. Montjoy Trimble, was substituted in lieu thereof.

During the June, 1979 pre-trial conference, Respondent's dilatory conduct over the course of six years was brought to the District Court's attention. Petitioner, Hougland requested that the District Court decertify the class because of Respondent's failure to prosecute the case. The District Court allowed Petitioner, Hougland to file a motion to decertify and a hearing on the decertification issue was scheduled for September 18, 1979.

At the September 18, 1979 hearing, the parties were given additional time to take discovery regarding class decertifi-

cation. The District Court eventually overruled the motion to decertify on November 30, 1979.

In the three years following the District Court's ruling on decertification, the Respondent managed to notice five depositions. A deposition taken on June 22, 1982 was the last act of Respondent to prosecute this case prior to its dismissal.*/

On December 8, 1983, the District Court, on its own motion, questioned Respondent's lack of diligence in the ten years the case had been pending. The District Court issued a Show Cause Order requiring Respondent to demonstrate why the action should not be dismissed for failure to prosecute. The District Court issued this order four full years

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*/ Several of the depositions taken by Respondent between 1973 and 1982 have yet to be transcribed.

after Respondent's failure to properly prosecute the case was first brought to its attention at the 1979 pre-trial conference.

Respondent's response to the Show Cause Order presented no viable excuse for the egregious lack of prosecution over the course of ten years. Counsel for Respondent admitted that the major reason for his lack of diligence was his commitment to other cases. (Respondent's Response to the Show Cause Order is attached hereto as Appendix C). In addition, Counsel for Respondent argued that discovery ceased after June of 1982 not because of his dilatory conduct, but because of an alleged discovery dispute which arose because Respondent had failed to have the depositions, already taken, transcribed.

On February 24, 1984 the District Court issued its Opinion dismissing the action for failure to prosecute. The Opinion noted that the District

Court thoroughly reviewed the record in this case as well as the affidavits of Counsel for Respondent in determining whether or not the action should be dismissed. The District Court noted that the underlying facts of the case dated as far back as 1969 and that there were numerous and significant periods of inactivity which were solely attributable to the Respondent. (App. B. pp. 7 & 9). The District Court rightfully rejected counsel for Respondent's excuse that he had been too busy on other cases to effectively prosecute this action.

In considering whether dismissal was warranted, Judge Allen, a jurist renowned for his patience and reticence to dismiss cases, considered these relevant factors: (i) Respondent's lack of diligence; (ii) the length of delay; (iii) the procedural history of the case; (iv) its complexity; (v) the public interest in expeditious resolution of litigation; (vi) the risk

of prejudice to the defendants; and (vii) the policy favoring disposition of cases on their merits. (App. B. p. 3).

After weighing these factors and with full consideration having been given to the facts of the case and the affidavits filed by Respondent's Counsel, the District Court reached the only possible conclusion -- the responsibility for the unexcused delay in the prosecution of the case lay with the Respondent and with Respondent's Counsel. Respondent simply had not made a genuine or lasting effort to move the case forward. Thus, the District Court dismissed the action on February 24, 1984.*/

In reviewing Judge Allen's dismissal, the Sixth Circuit ignored the blatant disregard of the case by Respondent's

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*/ This Court should be aware that although Respondent claims there are one thousand potential plaintiffs interested in this case, in the ten years this action languished on the District Court's docket before dismissal, at no time was there any active participation or attempt to intervene by even a single individual.

Counsel, as well as Respondent's inability to justify the delay, and simply substituted its judgment for that of the District Court. Initially, the Sixth Circuit's Opinion admits that "the dilatory performance of plaintiffs' [sic] several counsel cannot be excused." (App. A. p. 2). In spite of this recognition that Respondent, through her chosen counsel, was the source of the delay, the Sixth Circuit forgave Respondent's dilatory conduct by reversing the dismissal. The Sixth Circuit's decision effectively emasculates the ability of a trial court to dismiss cases pursuant to Rule 41(b) by holding that the sanction of dismissal can only be utilized when no other sanction is available.

The Sixth Circuit insisted upon substituting its judgment for that of the District Court in determining that it would not have dismissed Respondent's case. In duplicating the role of the

District Court, the Sixth Circuit ignored the findings of the District Court. Contrary to the inescapable conclusion reached by Judge Allen, the Sixth Circuit somehow determined that Respondent's counsel spent a "substantial amount of time on the case." (App. A. p. 2). The Sixth Circuit also noted that there had been considerable activity on the docket inferring that this constituted evidence of Respondent's efforts to prosecute the case. The Sixth Circuit's Opinion overlooks the fact that there were approximately 35 defendants and the case had been pending for 10 years. The amount of third party practice, withdrawals by counsel and actions taken by the District Court could well account for all the docket entries without any action taken by Respondent whatsoever. In fact, the docket itself shows that the Respondent, in the ten years the case was pending before the District Court, affirmatively undertook only three minor

flurries of discovery. In 1973, Interrogatories were served upon certain defendants, and a Request for Production upon one defendant. In 1976, Interrogatories were served upon one defendant. In 1980, Respondent noticed the depositions of five of the defendants. The last affirmative action undertaken by Respondent was a deposition taken on June 22, 1982. As previously stated, the Sixth Circuit noted this conduct was in fact dilatory and unexcusable. Having so spoken, and contrary to legal standards established by this Court, the Sixth Circuit nevertheless held that Respondent could not be held responsible for its chosen counsel's dilatory conduct.

The most egregious statement in the Sixth Circuit's Opinion is that because the class of plaintiffs would simply file a new action against the named defendants, and perhaps, as well, "a professional negligence action" (App. A., p. 3), little

would be achieved by a dismissal. The Sixth Circuit wrongfully assumed that ten years worth of prejudice to the Petitioners could have been wiped out had the District Court simply scheduled a trial date "to compel diligent professional behavior from plaintiff's counsel." (App. A., p. 3).

The Sixth Circuit's reasoning ignores the fact that with each passing day, a defendant's ability to properly defend itself deteriorates. In the ten years that the action has been pending, memories have faded, witnesses have come and gone and evidence has disappeared.

In light of both the total lack of prosecution by Respondent over the ten year period this action was pending prior to dismissal and the prejudice to the other parties, the District Court did not abuse its discretion in dismissing Respondent's Complaint. The decision of the Sixth Circuit to the contrary is

in error in that it defeats the salutory purpose served by Rule 41(b), which has been recognized by this Court.

REASONS FOR GRANTING THE WRIT

A writ should be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit which reversed the District Court's Rule 41(b) dismissal for lack of prosecution. The opinion of the Sixth Circuit, ejects dismissal as an appropriate sanction whenever a lesser sanction is available, regardless of the findings of the District Court. Such action by the Sixth Circuit evidences the need for guidance from this Court as to when a district court has allegedly abused its discretion in dismissing an action for failure to prosecute.

The issuance of a writ is also warranted because there is conflict among the circuits as to what constitutes abuse of discretion in dismissing actions for failure to prosecute pursuant to Rule 41(b). Resolution of

the issues raised in this Petition would be consistent with other decisions of this Court which have clarified various standards of review. Such guidance from this Court will eventually relieve the overburdened judicial system.

In Anderson v. City of Bessemer City, North Carolina, ___ U.S. ____, 53 U.S.L.W. 4314 (U.S. March 19, 1985) (No. 83-1623), this Court clarified the standard of review under Rule 52(a) of the Federal Rules of Civil Procedure, by further defining the parameters of the clearly erroneous standard. The decision notes that appellate courts, in reviewing decisions pursuant to Rule 52(a), have been simply duplicating the role of the lower court which results in additional costs to the litigants as well as the wasteful diversion of judicial resources. The decision of this Court dictates that an appellate court cannot reverse a decision pursuant to Rule 52(a), even if it is convinced that if it had

been sitting as trial judge it would have reached a different result, as long as the district court's account of the evidence is plausible. In addition, this Court advised appellate courts that a trial court's credibility determinations must be given even greater deference. The decision in Anderson, supra will be beneficial to both district and appellate courts by eliminating needless appeals, as well as the costly and time consuming effect of appellate reversals, as would a similar clarification of the issues presented here.

This Court also took the opportunity in Bose Corporation v. Consumers Union of United States, Inc., ___ U.S. ___, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), to clarify the Rule 52(a) standard of review in a libel action. In Bose, supra this Court provided guidance to district and appellate courts by reaffirming that Rule 52(a) of the Federal Rules of Civil Procedure

does not prescribe the standard of review in determining actual malice. ___ U.S. at ___, 104 S.Ct. at ___, 80 L.Ed.2d at 525-26. It is now unmistakably clear to both district and appellate courts that in cases involving libel and other First Amendment considerations, not involved herein, the court upon review is not bound by the clearly erroneous standard set forth in Rule 52(a).

This Court has also previously delineated what constitutes abuse of discretion for purposes of dismissals granted pursuant to Rule 37 of the Federal Rules of Civil Procedure. In National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), this Court held that an appellate court should not second guess the trial court by questioning whether it, acting as the trial court, would have dismissed the action. Instead, the appellate court can only determine whether the district court abused its discretion in dismissing the action. Id. at 642.

In that decision, this Court also commented that reversal of a district court's dismissal propagates and encourages dilatory conduct by counsel. This decision recognizes that the trial court's power to control, deter and penalize the dilatory conduct of counsel can act as a warning to other counsel that the Federal Rules of Civil Procedure will be used for their express purpose -- "to secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1.

As this Court stated, appellate courts must be cognizant of this policy:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having

> the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the District Court.
>
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts.

427 U.S. at 642-43.

This Court has also outlined what constitutes abuse of discretion in relation to Rule 54(b). In Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980), this Court held that a trial court has the discretion to certify a question for

appeal and any abuse of that discretion is reviewable by the appellate courts. This Court reiterated that the standard against which a district court's exercise of discretion is to be judged is the "interest of sound judicial administration." Id. at 12. This Court also warned appellate courts not to reweigh equities or reassess facts but, simply to see if the lower court's decision is judicially sound. Under this abuse of discretion standard and because of the trial court's familiarity with the case, an appellate court should not disturb a trial court's assessment unless its decision is clearly unreasonable.

This Petition for Writ of Certiorari presents this Court with an opportunity to establish guidelines as it has with respect to Rules 37, 52(a) and 54(b), so that appellate courts no longer misapprehend or misapply the standard of review in cases dismissed pursuant to Rule 41(b). A decision by this Court would further

benefit the judicial system since it would allow trial courts to effectively control their own dockets and deter dilatory conduct by counsel without undue appellate interference.

In the only decision by this Court addressing Rule 41(b), this Court held that it is within the discretion of the trial court to dismiss a case sua sponte for failure to prosecute. Link v. Wabash R.R. Co., 370 U.S. 626, 629-31 (1962). Accordingly, an appellate court should not disturb such a dismissal unless the trial court has abused its discretion in granting the dismissal.

Strong public policy favors vesting such discretion in the trial court, which must have the power to assure the just, speedy and inexpensive determination of every action and keep its calendar clear and free from congestion. Failure to restrain appellate courts from overturning dismissals will impair confidence in the

trial court, resulting in increasing dilatory conduct, further multiplicity of appeals and additional expense and delay, all of which undermine the finality of decisions.

Moreover, the discretion to dismiss must be vested with the trial court in order to protect defendants from the prejudice which naturally results from plaintiffs' dilatory conduct.

Finally, the trial court must have the ability to dismiss a case for failure to prosecute. This ability, together with the knowledge that the appellate court will be extremely reluctant to overturn such a decision, is the most effective deterrent to dilatory practices before the trial court.

While this Court did not establish in Link, supra, nor has it established since that decision, what constitutes abuse of discretion in dismissing a case pursuant to Rule 41(b), this Court did recognize that trial courts must have

the ability to dismiss cases in order to control their dockets, to avoid congestion and to insure orderly disposition of cases.

Most importantly, unless the uncertainty regarding the exact parameters of abuses of discretion for purposes of Rule 41(b) are resolved, district court judges will become even more reticent to dismiss cases, regardless of how long they linger on the docket, and the court system will become even more inaccessible than it is at the present time.

The decision of the Sixth Circuit at issue and its effects are illustrative of the need for guidance from this Court under Rule 41(b), as has been provided for Rules 37, 52(a), 54(a) and 54(b), and to define exactly what constitutes abuse of discretion in dismissals. After the Sixth Circuit's reversal of the District Court's dismissal, Respondent, who had been admittedly less than active in prose-

cuting the case, of course immediately became active in moving the case forward.

The message sent by the Sixth Circuit to other counsel in the Circuit is that it is acceptable to allow an action to languish on the court's docket for over a decade without fear of dismissal or, if dismissed, the Sixth Circuit will reverse and give counsel another chance to properly prosecute the case. Unlike Judge Allen, the Sixth Circuit concerned itself not with the prejudice to the defendants, but with concern for the possibility that a new class action could be filed as well as a professional negligence action against Counsel for Respondent. Clearly, the Sixth Circuit's focus was misplaced.

The Sixth Circuit's Opinion also demonstrates a lack of understanding as to the proper standard of review of an alleged abuse of discretion. In the Sixth Circuit's curt three-page opinion, it never determined whether in fact the District

Court had abused its discretion in dismissing the case. Instead, the Sixth Circuit, with hindsight, simply substituted its judgment for that of the District Court.

Contrary to the District Court's determination and the admission by Respondent's Counsel that he had been dilatory in prosecuting the case, the Sixth Circuit found that Respondent's Counsel had "spent a substantial amount of time on the case." The Sixth Circuit also determined that any delays by Respondent's Counsel were excusable and should not be attributed to the Respondent herself. This ruling of the Sixth Circuit is contrary to this Court's opinion in Link v. Wabash R.R. Co., 370 U.S. 626 (1962). A plaintiff must be held responsible for the dilatory practice of his chosen attorney and be subject to dismissal for failure to prosecute. If the plaintiff does not share the responsibility, only the defendant would be penalized when a plaintiff's chosen counsel fails

to prosecute a case. Moreover, this Court's decision in Link, supra, infers that an attorney cannot excuse his failure to prosecute a case because of commitments to other cases. Id. at 639. United States v. Fears, 450 F.Supp. 249, 251 (E.D. Tenn. 1978) (quoting Link v. Wabash R.R. & Co., 370 U.S. at 629-30).

In addition, the Sixth Circuit wrongfully inferred that because the docket shows considerable activity the Respondent had in fact effectively prosecuted the case. This opinion ignores the facts, well known to Judge Allen, that the length of the docket sheet, 21 pages, bore no relationship whatsoever to the number of affirmative steps taken by the Respondent in prosecuting the case.

Judge Allen was convinced that because of the passage of time and the unwarranted delay in prosecuting the case, that the Petitioners and other defendants had been prejudiced. The Sixth Circuit, however,

somehow determined that if the District Court had simply set a trial date and allowed the case to proceed, all prejudice to the defendants from the ten-year delay would have somehow been eliminated. The Sixth Circuit's reinstatement of the case cannot refresh the memories of witnesses that have faded since 1969, nor can the Sixth Circuit reconstruct any evidence that has deteriorated in that time. The decision of Judge Allen was not unreasonable and, thus, the Sixth Circuit's reassessment and reweighing of the facts and equities was unwarranted and in disregard of the standard of review set by this Court. Because of unwarranted reversals such as that by the Sixth Circuit, defendants are unable to resist dilatory claims by plaintiffs, and diligent plaintiffs vigorously prosecuting their cases are denied access to the courts.

The misapplication of the standard of review in Rule 41(b) cases by the Sixth

Circuit is not limited to the instant case, but is evident from the numerous other cases decided in the Circuit. In a very recent decision by the Sixth Circuit Patterson v. Township of Grand Blanc, et al., No. 84-1317 (April 14, 1985), the Sixth Circuit again disregarded this Court's decision in Link, supra, when it reviewed a dismissal pursuant to Rule 41(b) and refused to attribute any delay on the part of plaintiff's counsel to plaintiff himself. By relieving plaintiff of the responsibility for the actions of his agents, the Sixth Circuit will always be provided an excuse to reverse dismissals and provide dilatory plaintiffs and their counsel with yet another opportunity to clog the overburdened court system.

The Sixth Circuit's adoption of a standard requiring that no fault for failure to prosecute can be assessed to the plaintiff has rendered Rule 41(b) a nullity. See Carter v. City of Memphis, Tennessee,

636 F.2d 159 (6th Cir. 1980) (reversing a dismissal for failure to prosecute because plaintiff should not be punished for his attorney's dilatory conduct); Edsall v. Penn Central Transp. Co., 479 F.2d 33 (6th Cir. 1973) cert. denied, 414 U.S. 1040 (1973) (reversing dismissal pursuant to Rule 41(b) because of reluctance to punish client for the dilatory behavior of his lawyer). The practical effect of the cumulative decisions of the Sixth Circuit is to countenance the continuation of any case upon the docket regardless of the failure of the plaintiff's attorney to prosecute.

This Petition should also be granted because misapplication and misapprehension of the standard of review by appellate courts has resulted in a conflict among the circuits that this Court should resolve.

This Court has never established or promulgated guidelines for the appellate

courts to apply in reviewing Rule 41(b) dismissals. In the absence of uniform guidelines, the circuits differ both in what constitutes abuse of discretion in Rule 41(b) cases and what factors the circuits will consider in reviewing such dismissals. At the present time, defendants and district court judges in the Sixth Circuit stand in a position different than defendants and judges in any other circuit when a Rule 41(b) dismissal is under review. Whereas, in other circuits a Rule 41(b) dismissal for failure to prosecute is generally upheld, the Sixth Circuit has consistently reversed Rule 41(b) dismissals granted for this reason.

The Sixth Circuit's position as demonstrated in this case, conflicts with rulings issued by this Court as well as decisions in other circuits in five different ways. Guidance from this Court in at least these five areas would resolve the present conflict among the circuits.

1) In reviewing this decision, the Sixth Circuit failed to apply the rule established by this Court that the plaintiff is responsible for the dilatory conduct of plaintiff's counsel. See Link v. Wabash R.R. Co., 370 U.S. 626 (1962).

2) The Sixth Circuit departed from decisions from this Court and other courts by holding that the sanction of dismissal can only be utilized when no other sanction is available. See Link, supra; National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976); Citizens Util. Co. v. Am. Tel. and Tel. Co., 595 F.2d 1171 (9th Cir. 1979), cert. denied, 444 U.S. 931 (1979) (upholding the propriety of the lower court's Rule 41(b) dismissal without consideration of whether lesser sanctions were available); Lyell Theatre Corp. v. Loews, 682 F.2d 37 (2d Cir. 1982) (affirming dismissal of seven year old action, held sanction of dismissal is a vital aspect of the trial court's

authority and ability to administer justice and provide meaningful access to other prospective litigants).

3) The Sixth Circuit erred in excusing Counsel for Respondent's admittedly dilatory conduct on the basis that such conduct was attributable in major part to his commitment to other cases. See Chira v. Lockheed Aircraft Corp., 634 F.2d 664 (2d Cir. 1980) (upholding the Rule 41(b) dismissal since the delay by plaintiff's counsel was caused by the commitment to other work and thus was inexcusable); U.S. v. Fears, 450 F.Supp. 249 (E.D. Tenn. 1978), (relying upon Link, supra holding that the professional schedule of a busy lawyer cannot be allowed to disrupt the orderly administration of justice).

4) The Sixth Circuit wrongfully accepted the argument of Counsel for Respondent that his failure to take discovery was caused by circumstances beyond his control, i.e., a discovery dispute. See Dowdell v.

Sunshine Biscuit, Inc., 90 F.R.D. 107 (M.D. Ga. 1981), aff'd, 673 F.2d 1343 (11th Cir. 1982) (affirming dismissal of a class action, the court held that failure of plaintiff's counsel to seek a discovery conference when discovery was at a standstill, was inexcusable delay); Food Basket, Inc. v. Albertson's, Inc., 416 F.2d 937 (10th Cir. 1969) (opposing counsel's failure to respond to discovery request held to be insufficient justification for failure to diligently pursue the action when counsel for plaintiff failed to seek desired information by discovery or other means).

5) The Sixth Circuit erroneously disregarded the prejudice which has resulted to the defendants in this action because of a ten year delay. See Alexander v. Pac. Maritime Ass'n, 434 F.2d 281 (9th Cir. 1970), cert. denied, 401 U.S. 1009 (1971) (upholding a sua sponte dismissal and noting that prejudice to the defendant and his defenses

were to be presumed by unreasonable delay); Citizens Util. Co. v. Am. Tele. and Tele. Co., 595 F.2d 1171 (9th Cir. 1979), cert. denied, 444 U.S. 931 (1979) (finding no abuse of discretion in the trial court's decision that the defendant was prejudiced by plaintiff's lack of diligence in prosecuting the case).

CONCLUSION

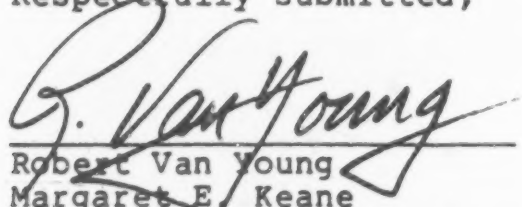
This Court should not permit the Sixth Circuit or any other appellate court in Rule 41(b) cases to substitute its judgment for that of the district court in reviewing the propriety of dismissals for failure to prosecute.

Moreover, considering the congested dockets of the federal court system and the conflict that now exists among the circuits with respect to utilizing dismissals as sanctions, this Court should establish guidelines for Rule 41(b) dismissals in order to prevent injustices such as that suffered by the Petitioners in this case.

Finally, it would appear to be in the interests of judicial economy and justice to allow the trial court to control and administer its own docket so that those claimants who actively pursue their claims will not be prejudiced by an inability to have their causes heard.

For the reasons stated above, the Petitioners respectfully request that this Honorable Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,



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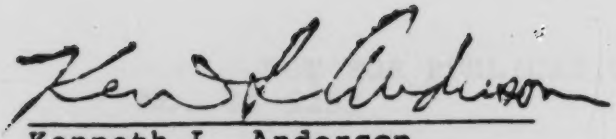

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May 13, 1985

NOT FOR PUBLICATION

No. 84-5253

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULIA V. SPARROW HOLT (ATCHISON), on behalf of herself and all others similary situated,

Plaintiff-Appellant

v.

JOSEPH W. ZAPPA; PARTICIA L. HERSHBERGER and PEOPLE'S TRUST CO., Co-Extrs. Estate of James H. Hershberger, deceased; LOUIS R. STRAUB; NORMAN R. AULT; EDWIN PENNA III; RUSSELL E. PAGELER; THOMAS SMITH BORDERS; ERIC C. TACHAU; BARNEY A. TUCKER; GLENN SPURGEON; PHILIP G. HERSHBERGER; EDWARD F. DERRY; MARTIN M. SCHWARZ; GARY D. MEEKER; ROBERT A. ALLABASTRO; JEROME D. WARNER; T. J. ZUMBIEL; GARY L. FOSTER; MARK DEVELOPMENT CO.; NATIONAL UNDERWRITERS, INC.; WENDELL C. HOLLAN; CHARLES K. HOLLAN; WANDA D. HOLLAN; HAROLD W. DAVID a/k/a HAROLD WALTER DAVIS; JEAN C. DORSEY; LYNN M. ROSS; DSI INVESTMENTS, INC.; ROBERT BASOL SINGLETON; THEODORE E. DEEKEN; DAVID P. GASH; NATIONAL UNDERWRITERS, INC.; WHAYNE M. HOUGLAND; EBERLY HAMMACK; WELENKEN, HIMMELFARB & CO.; FRED R. BECKER ADVERTISING AGENCY, INC.; GEORGE M. STAPLES and D.A. SACH, III,

Defendants-Appellees

APPENDIX A

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE WESTERN
DISTRICT OF KENTUCKY

Before: MERRITT and MILBURN, Circuit Judges; PECK, Senior Circuit Judge

FILED FEB 11 1985

JOHN P. HEHMAN, CLERK

MERRITT, Circuit Judge. In this appeal from the District Court's dismissal of a securities fraud action for failure to prosecute, we must make a difficult decision based on competing equities. The District Court's dismissal of the action under Fed.R.Civ.P. 41(b) for failure to prosecute the action diligently, entered after a show cause hearing initiated by the Court's sua sponte motion to dismiss, was based on the Court's analysis of such factors as the plaintiff's clear lack of diligence (evidenced by a cumulative period of dormancy of well over four years), the procedural history of the case, the

public interest served by the suit and the risk of prejudice due to the delay. We fully understand Judge Allen's frustration with this case, which was filed in 1973 and alleged facts dating back to 1969. The dilatory performance of plaintiff's several counsel cannot be excused. However, dismissal is an extreme sanction, one that our Court has long held should be invoked only rarely. See, e.g., Carter v. City of Memphis, Tennessee, 636 F.2d 159, 161 (6th Cir. 1980); Edsall v. Penn Central Transportation Co., 479 F.2d 33 (6th Cir. 1973). The sanction should be used only when no less powerful or ultimate sanction is available. See Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 665 (2nd Cir. 1980) (stating that the sanction should be used only when the district judge "is sure of the impotence of lesser sanctions"). This Court is

under a duty to scrutinize dismissals with the utmost care.

Plaintiff's counsel assumed responsibility for this case in 1979. He has apparently spent a substantial amount of time on the case and the docket shows considerable activity. Among other actions, he did make efforts to secure depositions during 1982. These efforts were impeded by circumstances arguably beyond his control, and his response to those difficulties can be characterized as excusable neglect.

The District Court can easily use the lesser sanction of simply setting a trial date to compel diligent professional behavior from plaintiff's counsel. Doing so would ensure that the class of over one thousand plaintiffs in this securities fraud action may be afforded their day in court despite their lawyers' conduct, and that any potential prejudice to the

defendants because of delay will be eliminated. In light of the District Court's decertification of the class, dismissal of the case would likely generate a new class action and the necessity to start the proceedings all over again, as well as a professional negligence action. Little would have been accomplished.

Because a lesser sanction is available, however, and because dismissals are to be employed only as a last resort, we reverse the judgment of the District Court and remand for proceedings not inconsistent with this opinion.

ISSUED AS MANDATE: MARCH 5, 1985
COSTS: NONE

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk

By /s/Audrey Crockett
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JULIA V. SPARROW HOLT (ATCHISON), On Behalf of Herself and All Others Similarly Situated,
Plaintiff,

CIVIL ACTION

v.

No. C 7568L(A)

JOSEPH W. ZAPPA, et al.,
Defendants.

J U D G M E N T

The Court, having issued its show cause order, and the defendants, having moved for decertification of the class action, and the parties, having briefed the questions presented, and the Court, having filed its memorandum opinion and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the complaint of the individual plaintiff, Julia V. Sparow Holt [sic] (Atchison) be and it is hereby dismissed with prejudice.

APPENDIX B

IT IS FURTHER ORDERED AND ADJUDGED that the motion to decertify the class action be and it is hereby sustained.

This is a final and appealable judgment and there is no just cause for delay.

Dated 2/24/84

/s/Charles M. Allen, Chief Judge
CHARLES M. ALLEN, CHIEF JUDGE

cc: Counsel of Record

ENTERED
FEB. 24 1984

JESSE W. GRIDER, CLERK
BY /s/B. Steutermann
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JULIA V. SPARROW HOLT
(ATCHISON), On Behalf of
Herself and All Others
Similarly Situated,
Plaintiff, CIVIL ACTION

v. No. C 7563 L(A)

JOSEPH W. ZAPPA, et al.
Defendants.

MEMORANDUM OPINION

This action was filed on February 2, 1973, and is based on actions and facts alleged to have gone back to 1969. In 1979, various defendants filed motions to decertify the class which had been certified by the late Chief Judge Rhodes Bratcher in September 1976. It was argued at that time that no action had been taken by plaintiff or her counsel from April 7, 1977 until counsel for plaintiff appeared at a pretrial conference on June 4, 1979. The Court held a hearing on September 18,

1979, and on November 30, 1979 overruled the motion to decertify the class.

On December 8, 1983, the Court issued a show cause order sua sponte directing the plaintiff to show cause why the action should not be dismissed for lack of prosecution. In issuing the show cause order, the Court cited the last known activity which was a deposition of Philip G. Hershberger, M.D. That deposition, according to counsel, was taken on June 29, 1982 and not filed until February, 1983.

An affidavit was filed by Charles L. Calk on December 22, 1983, who recited that he is a partner in the firm which represents the plaintiff, and that the firm has spent some 840 hours in its representation of plaintiff. The affidavit goes on to recite that James A. Kegley of the law firm representing plaintiff resigned from that firm on February 1, 1983, and that affiant had no contact

with the case from May 1980 until Mr. Kegley's departure from the firm. The affidavit also recites that J. Montjoy Trimble was co-counsel with Mr. Kegley for Ms. Atchison, and that because of his employment, Mr. Calk had no contact with the case from May 1980 until February 1983.

The affidavit then goes on to recite a dispute which occurred between David Monohan, counsel for Whayne Hougland, and affiant as to whether or not affiant's law firm should pay for depositions of Barney Tucker and Marty Wellenken which had been transcribed by a Mrs. Sexton in Lexington. This dispute apparently took place in March 1983 and continued through August 1983.

Another affidavit was filed by J. Montjoy Trimble. This affidavit reflects the taking of four depositions in 1980 which consumed some 50 hours. Mr. Trimble took depositions in January and February

1982 of Barney Tucker and Wellenken-Himmelfard [sic], both defendants. The next deposition Mr. Trimble took was that of defendant Philip Hershberger on June 29, 1982. The rest of Mr. Trimble's affidavit is devoted to showing that he is an extremely busy attorney and has been during the period June 1, 1982 up to this date.

Rule 41(b), Federal Rules of Civil Procedure, provides in part as follows:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

The Rule also provides, in part,

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

In ruling on a motion to dismiss because of delay, the Court must consider

several factors, i.e,, the lack of diligence of a plaintiff, the length of delay since the filing of the suit, the procedural history of the case, its complexity, the public interest in expeditious resolution of litigation, the risk of prejudice to defendants from delay, and, on the other hand, the policy favoring disposition of cases on their merits. See Citizens Utilities Co. v. American Telephone and Telegraph Co., 595 F.2d 1171, 1174 (9th Cir.), cert. denied, 444 U.S. 931 (1979).

In the case at bar, the complaint was brought under the Securities and Exchange Act of 1934, Sec. 27. The claim involved fraudulent misrepresentations allegedly made by defendants with regard to the issuance of stock, such misreprsentations being made as long ago as 1969. Judge Bracher [sic] entered an order July 9, 1974 characterizing this case as a complex case.

We now review the entire procedural history of this case in order to determine the reasons for delay, and the parties who caused those delays. After the complaint was filed on February 2, 1973, the record reveals that the next two years were occupied by the filing of numerous pleadings, motions for summary judgment and motions to strike, and also involved the filing of an amended complaint by the plaintiff on November 20, 1973. On July 2, 1974, Judge Bratcher held his first pretrial conference and ruled on various motions filed by the parties. On November 1, 1974 Judge Bratcher signed an order remanding the motion of the plaintiff to certify the action as a class action.

It thus appears that two years and nine months were consumed by various pleading maneuvers, motions to strike and summary judgment motions. This court places no responsibility on the plaintiff for this

lapse of time and for any delays that arose during that period.

From November 1, 1974 until April 9, 1975 no docket entries appear. April 9, 1975 through September 15, 1975 concerns motions to withdraw as counsel filed by William T. Warner and Lowell W. Lundy. On September 12 and September 17, 1975, Judge Bratcher sustained the motion of the plaintiff to dismiss various counter-claims, and the request of the plaintiff for production of documents. On October 2, 1975, Judge Bratcher dismissed the motion of Whayne M. Hougland. On September 7, 1976, Judge Bratcher upheld the motion of plaintiff for class action certification, with certain exceptions not relevant here. On October 13, 1976, Judge Bratcher signed an amended order providing for notice of pendency of the class action and the determination of the class.

During the years 1977 and 1978, the

only docket entry we find which manifests activity on the part of plaintiff was a notice to take the deposition of Whayne M. Hougland dated April 1, 1977. That motion was withdrawn on April 11, 1977. Athough the plaintiff's deposition was taken on June 6 and June 14, 1979, we find no further action taken by plaintiff to prosecute the case until January 3, 1980, when plaintiff filed a motion to take the deposition of Mr. Hougland. On April 11, 1980, a motion was filed by the plaintiff to take the deposition of Louis R. Straub, and on August 22, 1980, the notice to take the deposition of Eric S. Tachau was filed.

On November 13, 1981, plaintiff filed a notice to take the depositions of Philip G. Hershberger and Wellenken, Himmelfarb & Company. Another notice was filed by the plaintiff as to these two and apparently as to Barney Tucker on December 1 and

December 7, 1981. Following the Court's sustaining of a motion to quash the notices as to time and place, plaintiff was given leave to reschedule the depositions on reasonable notice. This was done on January 15, 1982 as to Wellenken, Himmelfarb & Co. and Barney Tucker, but not until June 11, 1982 as to Philip Hershberger. During the year 1983, the docket entries reflect no action on the part of plaintiff, other than the filing of the deposition of Dr. Hershberger, which had been taken on June 29, 1982.

Summing up the procedural history of the case, the Court finds that the plaintiff should be charged with the delays which ensued between April 7, 1977 and June 29, 1979, a period of two years and two months. The Court also observes that during 1980 and 1981, only four notices to take depositions were filed, and that no notices to take them were filed between

August 22, 1980 and November 13, 1981, a period of some fifteen months, a delay which could only be charged to the plaintiff.

Finally, the Court notes that no action has been taken in the case by plaintiff between the period June 29, 1982 and December 1983, a period of seventeen-plus months, a delay which again is attributable only to plaintiff.

We then conclude that of the now eleven years that this case has been in litigation, delays of four years and ten months in unreasonable delays should be charged to the plaintiff.

The Court is well aware of the principle that ordinarily the law favors the right of the litigants to have a trial of their action on the merits, and that actions should not be dismissed for want of prosecution merely because of the running of time. The Court has been unable to locate a case from the United States Court of Appeals

for the Sixth Circuit dealing with a situation such as is presented here, since Carter v. City of Memphis, Tennessee, 636 F.2d 159 (1980) deals with the dismissal of an action for an attorney's failure to comply with a pretrial order of a district court, a situation not involved in the case at bar.

More nearly in point is the case of Citizens Utilities Co. v. American Telephone and Telegraph Co., supra. From the opinion in that case, which was decided by a two to one margin, it appears that the case was in litigation for over sixteen years. The Court referred to the plaintiffs' effort to speed up the discovery process, consisting of four motions for a preliminary pretrial conference, aimed at establishing a schedule for completing discovery filed in the fifth, seventh, ninth and tenth years of the action. When the tenth year arrived, the district

judge entered a pretrial order establishing a briefing and hearing schedule for defendants' motions for summary judgment.

The proceedings concerning the motions for summary judgment then consumed a period of eighteen months. One year after the denial of the motions for summary, and thirteen years after the action was filed, the case was set for trial. Judge Harris, the trial judge, stated that he was unable to preside over the trial, and the case was remanded from the docket. A motion to withdraw was filed in the thirteenth year by plaintiff's attorney. No activity took place for two years, at which time new counsel for plaintiff appeared, and during that period no particular district judge had responsibility for the case.

The district court found that actual prejudice resulted to defendants from delays caused at least in part by Citizens' inaction. The majority opinion characterized

the case as a close one, but stated that since there was actual prejudice to the defendants and lack of diligence on the part of the plaintiff, the district court's order of dismissal should be sustained.

We believe that the facts in Citizens, supra, are more favorable to plaintiff than were the facts in the case at bar. Plaintiff in that case at least took four positive actions to try to move the case to a trial date by setting up definite discovery periods. Its actions were in part frustrated by the actions of the defendants. In the case at bar, the plaintiff took only one such action, which was in 1977, and the total delays attributable to plaintiff exceed, in the opinion of this Court, the delays attributable to plaintiff in Citizens, supra. The fact that an attorney may have been very busy on matters other than those involving the plaintiff cannot be accepted by the

Court as a valid excuse for delays of the sort attributable to the plaintiff in this action.

We recognize that the parties have not come forward to show actual prejudice, but we are cognizant of the principle that prejudice may be presumed from unreasonable delays. See Alexander v. Pacific maritime Association, 434 F.2d 281 (9th Cir. 1970). We believe that plaintiff has not been diligent in prosecuting this action, and that, therefore, under the authorities cited and under Rule 41(b), the action should be dismissed with prejudice as to the individual plaintiff.

With respect to the class, there is pending a motion for class action decertification, and that motion will be sustained because of the lack of diligence shown by the class action representative.

A judgment in accordance with this opinion will be entered this day.

Dated 2/24/84

/s/Charles M. Allen, Chief Judge
CHARLES M. ALLEN, CHIEF JUDGE

cc: Counsel of Record

ENTERED
FEB 24 1984

JESSE W. GRIDER, CLERK
BY: /s/B. Steutermann
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE

JULIA V. SPARROW HOLT (ATCHISON), On Behalf of Herself and All Others Similarly Situated,	)	
Plaintiff,	)	
V.	)	CIVIL ACTION NO. 7653 L(A)
JOSEPH W. ZAPPA, ET AL.	)	
Defendants.	)	

RESPONSE OF PLAINTIFF
TO SHOW CAUSE ORDER

* * * * * * * * * * * * * * * * *

On December 8, 1983, this Court entered a Show Cause Order requiring the Plaintiff to show cause why this action should not be dismissed for failure to prosecute.

Rule 41(b) of the Federal Rules of Civil Procedure clearly gives this Court the discretionary power to dismiss an action for failure of a Plaintiff ". . .to prosecute." However, the mere lapse of time does not justify dismissal if

a Plaintiff has not been lacking in diligence. Ingram v. Kumar, 585, F.2d 566 (CA2d 1978). In determining what constitutes "failure to prosecute," a Court should consider all of the pertinent circumstances, 2 Moores Manual, Federal Practice and Procedure, Section 19.08, and even when a Plaintiff is not free from fault, dismissal is a harsh remedy and should not be invoked when the ends of justice can be served by the imposition of a lesser remedy. Edsall v. Penn Central Transportation Co., 479 F.2d 33 (CA6 1973) cert. denied 414 U.S. 1040 (1973).

The Affidavits of J. Montjoy Trimble and Charles L. Calk, co-counsel for the Plaintiff, which are attached to this Response as Exhibits "A and "B" respectively, clearly establish that the harsh remedy of dismissal should not invoked in this action against the Plaintiff and the class which she represents. Subsequent to J. Montjoy Trimble being employed as one

of the attorneys in this action on or about September 15, 1977, this action has been prosecuted in a diligent manner. Many discovery depositions have been taken, and the case would have been finally prepared for trial but for unforeseen circumstances beyond the control of the attorneys for the Plaintiff and her class.

After taking the discovery deposition of the Defendant, Phillip G. Hershberger, in Fort Wayne, Indiana, the Plaintiff scheduled no further discovery depositions because of the statement of David R. Monohan, one of the attorneys for a Defendant herein, to the effect that he would resist the taking of any further discovery depositions in this action until such times as the court reporter had transcribed depositions previously taken and not transcribed.

After this statement of Mr. Monohan was reported to Mr. James Kegley, formerly an attorney of record herein, Mr. Trimble scheduled no further discovery depositions

pending transcription of those depositions previously taken but not transcribed.

After Mr. Kegley left the firm of Gess, Mattingly, Saunier & Atchison, Charles Calk, of the firm of Gess, Mattingly, Saunier & Atchison, undertook to locate the court reporter and finally located her on or about February 25, 1983.

In February of 1983, Mr. Trimble was not in a position to continue with the completion of preprepation of this case for trial since between January of 1983 and April 25, 1983, Mr. Trimble was travelling in Europe with a client, attempting to close and consummate a business transaction which was finally closed on or about April 23, 1983.

Since Derby Day, May 7, 1983, Mr. Trimble has not been in a position to continue with the preparation of the case for trial because of his representation of First State Bank of Wayne County in an action now pending in the United States District

Court for the Eastern District of Kentucky which has been set for trial before the Honorable Eugene Siler, Judge, United States District Court, Eastern District of Kentucky, commencing January 26, 1984. This trial is expected to continue for at least one (1) week.

Mr. Trimble will not be in a position to continue with the preparation of this case for trial until sometime after on or about March 1, 1984, because of another trial scheduled in the United States District Court, Middle District of Florida, at Ocala, Florida.

Mr. Calk is not, from a practical standpoint, prepared to proceed with the preparation of the case for trial since it would require Mr. Calk to expend many, many hours to totally familiarize himself with the case and would require the review by him of the thousands of documents which have been produced during discovery in this action.

Subsequent to on or about March 1, 1984, Mr. Trimble and Mr. Calk will both be in a position to diligently complete the preparation of this case for trial and to try the case at the earliest possible date.

For the reasons stated herein and in the Affidavits attached hereto, it is respectfully submitted that the Plaintiff has shown cause why this action should remain on the docket and should not be dismissed for failure to prosecute.

TRIMBLE & HENRY

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GESS, MATTINGLY, SAUNIER & ATCHISON

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CERTIFICATE

This is to certify that true copies of the foregoing Response and Affidavits have been served upon the Defendants by mailing same as follows:

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Hartford, KY 42347
Defendant

all on this the 22 day of December, 1983.

/s/J. Montjoy Trimble
J. MONTJOY TRIMBLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE

JULIA V. SPARROW HOLT (ATCHISON), On Behalf of Herself and All Others Similarly Situated,	)	
Plaintiff,	)	
V.	)	Civil Action No. 7653 L(A)
JOSEPH W. ZAPPA, ET AL.	)	
Defendants.	)	

AFFIDAVIT OF J. MONTJOY TRIMBLE
IN RESPONSE TO SHOW CAUSE ORDER

* * * * * * * * * * * * * * * * * *

The affiant, J. Montjoy Trimble, after first being duly sworn, states as follows:

1. My name is J. Montjoy Trimble, and I am one of the attorneys of record for the Plaintiff herein, Julia V. Sparrow Holt (Atchison).

2. I was employed as one of the attorneys for the Plaintiff herein on or about September 15, 1977.

3. Thereafter and through on or about February 17, 1980, I reviewed the

EXHIBIT "A"

complex record in this action and the massive amount of documents which had been obtained through discovery. This review consumed approximately one hundred twenty-five (125) hours according to my time records.

4. On or about February 19, 1980, the deposition of the Defendant, Wayne Hoagland, was taken. The taking of this deposition consumed approximately eight (8) hours.

5. Thereafter I prepared for the taking of the deposition of the Defendant, Lewis Straub. These preparations consumed twenty-two (22) hours according to my time records.

6. The deposition of Lewis Straub was taken on May 6, 1980, and consumed approximately ten (10) hours.

7. Between October 28, 1980, and September 17, 1980, I prepared for the taking of the deposition of the Defendant, Eric Tachau. This preparation consumed

approximately ten (10) hours. On September 17, 1982, I travelled to Louisville, Kentucky, for the taking of the deposition of the Defendant, Tachau. Between October 13, 1980, and May 5, 1981, I prepared for the taking of the depositions of several other Defendants.

8. On May 5, 1981, I travelled to Louisville, Kentucky, and appeared for the taking of the deposition of the Defendant, Borders.

9. On January 15, 1982, I appeared for the taking of the deposition of the Defendant, Barney Tucker. On February 3, 1982, I appeared for the taking of the deposition of the Defendant, Welleken-Himmelfard.

10. On June 27, 1982, I travelled from Lexington, Kentucky, to Fort Wayne, Indiana, for the purpose of reviewing documents and taking the deposition of the Defendant, Phillip Hershberger. Hershberger's deposition was taken on June 29, 1982.

11. At the taking of the deposition of Phillip Hershberger, I was informed by Mr. David R. Monohan, one of the attorneys for the Defendants herein, that he would resist the taking of any further discovery depositions in this action until such times as the Court reporter had transcribed depositions previously taken and not transcribed.

12. Upon my return to Lexington, Kentucky, from Fort Wayne, Indiana, I informed James Kegley, my co-counsel, of Mr. Monohan's statement. Mr. Kegley promised to contact the Court reporter who had taken the depositions to have them transcribed. Consequently, I have scheduled no further discovery herein pending transcription of the discovery depositions.

13. Through the date of this Affidavit, I have expended two hundred eighty-seven hours in the preparation of this action.

14. In or about June of 1982, I was employed by American Bank & Trust Company of Lexington, Kentucky, to represent that bank in litigation involving a check kiting scheme and other fraudulent activities. The bank became involved in three (3) civil actions in the Fayette Circuit Court and one (1) civil action in the United States District Court for the Eastern District of Kentucky. These actions consumed many, many hours between June of 1982 and January of 1983.

15. In January of 1983, I was asked by a client to travel with him to Europe to assist him in closing a business transaction. I left Lexington, Kentucky, on January 27, 1983, and between January 27, 1983, and February 27, 1983, travelled to Luxembourg, Frankfort, Germany, Geneva, Switzerland, and returned to Lexington, Kentucky, on February 27, 1983.

16. Between February 27, 1983, and March 9, 1983, I prepared for and attended a two (2) day trial in Hindman, Kentucky.

17. On March 10, 1983, I departed from Lexington, Kentucky, and travelled to London, England, and Geneva, Switzerland, returning to Lexington, Kentucky, on April 1, 1983.

18. Between April 1, 1983, and April 5, 1983, I prepared for and attended to an oral argument before the Kentucky Court of Appeals.

19. On April 9, 1983, I departed Lexington, Kentucky, and travelled to London, England, for the closing of the business transaction, returning to Lexington, Kentucky, on April 25, 1983.

20. On Saturday, Derby Day, May 7, 1983, I travelled from Lexington, Kentucky, to Monticello, Kentucky, where I was employed to represent the First State Bank of Wayne County, Kentucky, in claims against some fifty-five (55) defendants, including the City & County Bank of Knox County, Tennessee, and the Federal Deposit Insurance Corporation.

21. On May 8, 1983, I travelled from Lexington, Kentucky, to Prestonsburg, Kentucky, and appeared during a trial in Hindman, Kentucky, May 10 and 11, 1983.

22. Between May 12, 1983, and May 23, 1983, I prepared for a trial to commence in Pikeville, Kentucky, on May 23, 1983, and commenced preparation of a Complaint to be filed in the United States District Court for the Eastern District of Kentucky concerning the First State Bank of Wayne County, Kentucky.

23. On May 22 and May 23, 1983, I travelled from Lexington, Kentucky, to Pikeville, Kentucky, and prepared for and attended a trial in the Pikeville Circuit Court on May 23, 1983.

24. The Complaint to be filed in the First State Bank of Wayne County matter was completed and filed at 8:30 a.m. on May 27, 1983. At 3:00 p.m. on that same day, the City & County Bank of Knox County, Tennessee, one of the defendants in said

action, was closed by the Tennessee Department of Banking and the receivership thereof assumed by the Federal Deposit Insurance Corporation.

25. Subsequent to May 27, 1983, my time has been, for all practicable purposes, one hundred percent (100%) consumed by the action now pending in the United States District Court for the Eastern District of Kentucky in which said action First State Bank of Wayne County seeks to recover from various defendants the sum of approximately Four Million Five Hundred Thousand Dollars ($4,500,000.00).

26. In or about September of 1983, the Honorable Eugene Siler, Judge, United States District Court for the Eastern District of Kentucky, at London, recognizing the importance of the action to the financial future of the plaintiff, First State Bank of Wayne County, severed the causes of action asserted therein against the Federal Deposit Insurance Corporation and assigned

those causes of action for trial commencing January 26, 1984.

27. Subsequent to the severance as aforesaid, I have appeared for the taking of discovery depositions in Knoxville, Tennessee, on two (2) separate occasions, Brandenburg, Kentucky, Elizabethtown, Kentucky, Bowling Green, Kentucky, Glasgow, Kentucky, Burkesville, Kentucky, Frankfort, Kentucky, and Louisville, Kentucky.

28. Also, during the week prior to September 26, 1983, I prepared for a hearing on a proposed Cease and Desist Order against First State Bank of Wayne County asserted by the Federal Deposit Insurance Corporation and attended hearings concerning the proposed Cease and Desist Order on September 26 and September 27, 1983.

29. Commencing on December 27, 1983, through December 30, 1983, I have scheduled the discovery of documents and discovery depositions in Knoxville, Tennessee, in

preparation for the January 26, 1984, trial.

30. Beginning January 3, 1984, through Friday, January 6, 1984, I have discovery depositions scheduled in Columbus, Ohio, at the Federal Deposit Insurance Corporation regional office in Columbus.

31. On January 10, 1984, a discovery deposition has been scheduled in Glasgow, Kentucky.

32. On January 11, 1984, Judge Siler has scheduled a pretiral conference in Lexington, Kentucky.

33. The trial involving First State Bank of Wayne County is now scheduled to commence on Monday, January 23, 1984, and is expected to continue for approximately one (1) week.

34. On February 21, 1984, I have a trial scheduled in the United States District Court for the Middle District of Florida at Ocala, Florida. This trial is expected to last approximately one (1)

week, and the preparation thereof will take approximately two (2) weeks.

Further the affiant saith not.

/s/ J. Montjoy Trimble
J. MONTJOY TRIMBLE

STATE OF KENTUCKY)
)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by J. MONTJOY TRIMBLE this the 22nd day of December, 1983.

My Commission expires May 7, 1984

s/s Linda Tackett
NOTARY PUBLIC
STATE AT LARGE, KY

AFFIDAVIT IN SUPPORT OF
RESPONSE TO SHOW CAUSE ORDER

Comes the affiant, and after being first duly sworn, states that he is a partner in the law firm of Gess Mattingly Saunier & Atchison, 201 West Short Street, Lexington, Kentucky 40507, who has represented the plaintiff, Julia V. Sparrow Holt Atchison, since the commencement of these proceedings; that affiant's firm has expended in excess of 840 hours in its representation of plaintiff; that Mr. James A. Kegley of this firm was counsel on behalf of the firm for Ms. Atchison until February 1, 1983, at which time Mr. Kegley resigned from the firm to become a member of the firm of Greenebaum, Doll & McDonald, who are counsel of record for defendant Wellenken, Himmelfarb & Co., thus precluding any further participation in this matter by Mr. Kegley; affiant, while generally familiar with the subject litigation, did not participate at all in the prosecution of plaintiff's claim until nearly all of the essential document discovery had been long since completed; that the decision was made after the employment of Mr. J. Montjoy Trimble as co-counsel with Mr. Kegley for Ms. Atchison that

affiant's participation would no longer be necessary; that affiant, therefore, has had practically no direct contact with this matter from May of 1980, until the date of Mr. Kegley's departure from this firm.

Affiant states that, after Mr. Kegley left the firm, affiant was advised that document inspection was ongoing by Mr. David Monohan, counsel for defendant, Wayne Hougland, and that efforts should be made to procure the transcripts of the depositions of Messrs. Barney Tucker and Marty Wellenken, from Mrs. Fontaine Sexton; affiant attempted to contact Mrs. Sexton, who had left Lexington, Kentucky, without notice by reason of personal marital difficulties and had relocated in Miramar, Florida; affiant attempted to call Mrs. Sexton on several occasions, leaving his name and telephone number on each occasion, but received no return calls from Mrs. Sexton; affiant caused letters to be written to Mrs. Sexton on February 25, 1983, March 11, 1983, April 8, 1983, and August 9, 1983; Mrs. Sexton replied to the letter of February 25, 1983, stating that she would "begin the transcriptions of the remaining transcripts upon payment of my statements

of account to the firm"; an examination of our accounts payable disclosed no sums due Mrs. Sexton and she was advised to that effect by the March 11, 1983 letter, to which no reply was received until on or about August 9, 1983; inquiry to Mrs. Secton reminding her that she was to have transcribed the depositions without charge for the original was responded to by her on August 12, 1983, reiterating that she would require payment prior to transcribing the depositions of Messrs. Tucker and Wellenken.

Affiant made inquiry of Mr. Trimble as to whether or not we should pay for the depositions of Messrs. Straub and Wellenken or if we could proceed without the transcription of these depositions; Mr. Trimble, at this time, was deeply immersed in an action on behalf of First State Bank of Wayne County and unable to make a decision with respect to how to proceed.

Affiant further states that, although affiant's limited participation to date would preclude his being able to properly prepare the case for trial and try the same without the assistance of Mr. Trimble

by reason of the complexity of this case, he has been and is now most willing to assist Mr. Trimble in the prosecution of this claim and will conform his schedule to accommodate an expeditious completion of discovery on behalf of the plaintiff and that affiant will use his best efforts to cause this action to be scheduled for trial at the earliest feasible date.

/s/ Charles L. Calk
CHARLES L. CALK

STATE OF KENTUCKY)
) SCT.
COUNTY OF FAYETTE)

Subscribed and sworn to before me this 22nd day of December, 1983 by Charles L. Calk.

My commission expires: May 7, 1984

/s/ Linda Tackett
NOTARY PUBLIC, KENTUCKY
STATE AT LARGE

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FILED
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No. 84-1786

In The

Supreme Court of the United States

October Term, 1984

WELENKEN HIMMELFARB AND CO.
WHAYNE HOUGLAND,
Petitioners,

vs.

JULIA V. SPARROW HOLT (ATCHISON)
ON BEHALF OF HERSELF AND
ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS, JULIA V. SPARROW HOLT (ATCHISON) AND ALL OTHERS SIMILARLY SITUATED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Is the decision of the Sixth Circuit consistent with the guidance established by this Court in *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962) with regard to dismissals under Federal Rule of Civil Procedure 41(b)?

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JURISDICTION

Respondents do not believe that any of the considerations under Rule 17 of the Supreme Court have been met.

The Circuits are not in conflict concerning the standard for dismissal under Federal Rule of Civil Procedure 41(b).

Moreover, the Sixth Circuit correctly applied the rulings of this Court and no important question of federal law is presented by the Petition.

The Petition before the Court does not present a question which warrants discretionary review.

STATEMENT OF THE CASE

This is a securities law case brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (the "1934 Act") and Rule 10b-5, 17 C.F.R. 240.10b-5, promulgated thereunder.

The plaintiff filed her class action complaint on February 2, 1973, alleging serious violations of the federal securities laws on the part of the defendants involving the offer and sale of shares of two corporations, Z-Industries, Inc. ("Z") and Modfac Industries, Inc. ("MODFAC") to some one thousand Kentucky investors.[1] After an initial round of discovery consisting of interrogatories, discussions with various parties, and examination of relevant documents, a number of defendants, by order of the district court, were both dropped and added, and the plaintiff was granted permission to file a first amended com-

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1 The original complaint dated February 2, 1973, paragraphs 14-20 of Count II, at 10-22, outlined the factual basis for the Section 10(b) and Rule 10b-5 violations. The prospectus contains too many untrue statements to examine in detail for our purposes here. It is sufficient to point out that they included misrepresentations as to how the proceeds of the stock offer were to be used, the nature of the issuer's businesses, and gross errors in depicting the financial status of the issuer.

plaint making the claims correspond to the facts then available to plaintiff's counsel. The first amended complaint was filed on November 20, 1973. The cause of action arose out of the statements in a prospectus dated October 17, 1969, regarding a stock sale of four hundred thousand shares of Z Industries stock at Five Dollars per share.[2] The securities became worthless and the plaintiff on behalf of the class of purchasers sought relief for a Two Million Dollar ($2,000,000) loss, interest, and costs.[3]

After months of motion practice, the first pretrial conference was held July 2, 1974, at which time Judge Bratcher made several rulings. There followed again many months of discovery activity.

On March 22, 1976, the plaintiff renewed her motion that the action be allowed to proceed as a class action. On September 7, 1976, Judge Bratcher upheld the motion of plaintiff for class action certification with certain exceptions. The class action notice was dated October 7, 1976, and was subsequently mailed to the members of the class.

More discovery ensued including interrogatories propounded to plaintiff by defendant, Whayne M. Hougland, on November 10, 1976. Most of 1977 was taken up by a third party complaint tendered by Warner and Zumbeil on February 22, 1977. No activity occurred in 1978.

In 1979 the case again became quite active. On May 22, 1979, the case was transferred to Judge Allen follow-

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[2] See Counts III-VIII of the first amended complaint dated September 28, 1973, at 30-36.

[3] See the first amended complaint dated September 28, 1973, at 50, 51.

ing the death of Judge Bratcher. A pretrial conference took place on June 4, 1979. A June 6, 1979, order regarding the pretrial conference was entered by Judge Allen in which he took several actions including striking Paul D. Gudgel[4] as counsel for plaintiff and substituting J. Montjoy Trimble.

It was approximately at this time that counsel for Hougland and other defendants renewed attempts to have the class decertified and a motion was filed to this effect on June 18, 1979. On June 11, 1979, a deposition of the plaintiff was taken by the defendants. On July 5, 1979, plaintiff filed a memorandum in opposition to defendants' motion to decertify the case as a class action. A hearing was held on September 18, 1979, before Judge Allen at which time the parties attended to discuss the status of the case. On November 30, 1979, Judge Allen entered an order overruling defendants' motion to decertify the class.

The year 1980 was taken up by various motions regarding appearances and withdrawal of counsel and by notice of depositions filed by the plaintiff.

In 1981 the plaintiff attempted to continue with some discovery and filed additional deposition notices.

In 1982 more discovery followed. The plaintiff took the deposition of defendant, Phillip G. Hershberger, in June 1982. On November 23, 1982, plaintiff filed answers to interrogatories propounded by defendant, Welenken Himmelfarb and Company.

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[4] Paul D. Gudgel had been elected to the bench in Kentucky and is now a judge of the Kentucky Court of Appeals.

No action was taken in 1983 until December 8, 1983, when Judge Allen entered a show cause order *sua sponte* commanding the plaintiff to give a full status report on the case and directing plaintiff to show cause why the case should not be dismissed for lack of prosecution.

The plaintiff responded promptly to the show cause order by filing a memorandum status report with affidavits from counsel, J. Montjoy Trimble and Charles L. Calk. Counsel submitted representations that discovery could begin to be completed in March of 1984 and that they were ready to go to trial as soon as possible thereafter.

In January of 1984 replies to plaintiff's response to the show cause order were filed by defendants Welenken, Hougland, and Hershberger. A motion to decertify the class was filed on January 6, 1984, by defendant Hougland.

On February 24, 1984, Judge Allen entered a Judgment and Memorandum Opinion in which the case was dismissed for lack of prosecution and the class decertified. In the Memorandum Opinion the district court concluded that the plaintiff had not been diligent in prosecution of the action. The court used the analysis of *Citizens Utilities Co. v. American Telephone and Telegraph Co.*, 595 F.2d 1171 (9th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979) and the authority contained in Federal Rule of Civil Procedure 41(b) as a basis for its dismissal and decertification. The court conducted a comprehensive review of the procedural history of the case and concluded that the plaintiff was responsible for four (4) years and ten (10) months of the delay in the eleven (11) years of litigation. The court specifically found no actual prejudice to the defendants (Mem. Op. at p. 9) but

noted its awareness of the principal that prejudice may be presumed from unreasonable delays. *Alexander v. Pacific Maritime Association,* 434 F.2d 281 (9th Cir. 1970), *cert. denied,* 401 U.S. 1009 (1971). Judge Allen also decertified the case as a class action based on his finding that the plaintiff had not been diligent in the prosecution of the case.

In an Opinion filed February 11, 1985, the Sixth Circuit reversed the decision of the district court and remanded the case for further proceedings. It should be noted that counsel for the Respondents moved for a pretrial conference and scheduled depositions subsequent to the issuance of the Sixth Circuit's mandate. Both of these actions have now been stayed pending this Court's review.

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REASONS FOR DENYING THE WRIT

Rule 17 of the Court's Rules provides that a review of a petition for a writ of certiorari is discretionary and will be granted only when there are special and important reasons therefor. Such reasons include the following:

(1) A federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter;

(2) A federal court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision;

(3) A federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court;

(4) A federal court of appeals has decided a Federal question in a way in conflict with applicable decisions of this Court.

In the fact pattern before this Court none of the foregoing reasons exist.

Judge Merritt, writing for the three judge panel of the Sixth Circuit Court of Appeals, recognized that the district court was faced with a difficult decision based upon competing equities. He observed that the district court considered several factors including the plaintiffs' lack of diligence, the procedural history of the case, the public interest served by the suit, and the risk of prejudice due to the delay. Judge Merritt stated that the judges on the Sixth Circuit's panel understood Judge Allen's frustration with the case and that they agreed with him that the performance of plaintiffs' several counsel was less than diligent and could not be excused. Nonetheless, the Sixth Circuit held that the dismissal was an extreme sanction that should be rarely used and cited as authority *Carter v. City of Memphis, Tennessee,* 636 F.2d 159 (6th Cir. 1980) and *Edsall v. Penn Central Transportation Co.,* 479 F.2d 33 (6th Cir. 1973), *cert. denied,* 414 U.S. 1040 (1973).

The Sixth Circuit also held that dismissal is inappropriate when lesser sanctions are available and cited *Chira v. Lockheed Aircraft Corp.,* 634 F.2d 664 (2nd Cir. 1980). The *Chira* opinion was authored by an eminent jurist, Judge Irving S. Kaufman. This case concerned a Lockheed lawyer who was fired and then sued his employer for wrongful termination. The district court affirmed the defendant's motion to dismiss under Rule 41(b) for failure to prosecute and the Second Circuit affirmed. Remarks by Judge Kaufman regarding the nature of a Rule

41(b) dismissal are insightful: "[t]he remedy is pungent, rarely used, and conclusive. A district judge should employ it only when he is sure of the impotence of lesser sanctions." *Chira* 665. Judge Kaufman reiterated in the decision that "[o]nly on rare occasions should a district judge deprive the languid litigant of his right to a trial on the merits. It is with reluctance that an appellate court will approve a dismissal with prejudice." *Id.* at 668. In the case before the Court the Sixth Circuit held that Judge Allen did not find that lesser sanctions were impotent. The Sixth Circuit properly concluded that the district judge could simply have scheduled a trial date to compel diligent performance by counsel and that this was the appropriate sanction.

A dismissal under Rule 41(b) is reversible only if an abuse of discretion has been shown. *Link v. Wabash R. R. Co., supra*; *Chira v. Lockheed Aircraft Corp., supra; The Citizens Utilities Co. v. American Telephone and Telegraph Co., supra; Anderson v. Air West, Inc.*, 542 F.2d 522 (9th Cir. 1976); *Alexander v. Pacific Maritime Association, supra.*

A court of appeals can find an abuse of discretion when it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a consideration of all the relevant factors. *Anderson v. Air West, Inc., supra; Alexander v. Pacific Maritime Association, supra; In Re Josephson*, 218 F.2d 174 (1st Cir. 1954); *States Steamship Co. v. Philippine Airlines*, 426 F.2d 803 (9th Cir. 1970).

In a Ninth Circuit case, *Pearson v. Dennison*, 353 F. 2d 24 (1965), Judge Duniway made insightful comments on the concept of abuse of discretion:

> We do not much like the term 'abuse' in this context. It has pejorative connotations not here appropriate. But it has become the customary word. Perhaps 'misuse' is milder. What we mean when we say that a court abused its discretion is merely that we think that it made a mistake. There are, however, cases in which the term abuse is appropriate. *Pearson* 28, n. 6.

The Sixth Circuit in its decision found that the district court made a clear error of judgment or a mistake because lesser sanctions were not considered, because dismissal would serve no purpose inasmuch as a new action would be filed (thus exacerbating the prejudice to the Petitioners caused by delay), because the Sixth Circuit concluded correctly that Respondents' counsel had spent a considerable amount of time on the case, and because at least some of the delay was attributable to difficulties beyond the control of counsel (excusable neglect regarding deposition transcription).

Other factors support the Sixth Circuit's reversal. There is a strong public policy of deciding cases on their merits and giving parties their day in court. This action has significant merit, particularly in light of the remedial nature of the 1934 Act and the implied causes of action that have arisen. *See Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 619 (1971); *Herman and MacLean v. Huddleston*, 103 S. Ct. 683 (1983).

This case is a perfect example of Murphy's Law—what can go wrong will go wrong! This action involves complex securities litigation with a large group of defendants and a class action group of plaintiffs numbering ap-

proximately 1000 investors. Factors essentially beyond the control of the Respondents and their counsel have been operating to contribute to the delays, i.e., death of the original trial judge, moves by the representative plaintiff, business liquidation of the companies involved in issuing the securities, illness of prior counsel's wife, withdrawal of prior counsel Gudgel due to appointment to the bench, withdrawal of prior counsel Kegley due to new employment which triggered a conflict of interest,[5] deposition scheduling difficulties, deposition transcription problems due to the disappearance of the court reporter, and other problems ad infinitum. It is clear that this case is materially different from other cases involving dismissal because counsel for the Respondents have never engaged in outright disobedience or defiance of court orders. *See Link v. Wabash R. R. Co., supra* (Dismissal because counsel failed to appear at a pretrial conference ordered by the court); *Dowdell v. Sunshine Biscuits, Inc.,* 90 F.R.D. 107 (N.D. Ga. 1981), *aff'd.* 673 F.2d 1343 (11th Cir. 1982) (Total failure by counsel to prosecute and direct disobedience by counsel of court orders and instructions); *Thompson v. J.D. Fleming,* 402 F.2d 260 (5th Cir. 1968) (Dismissal because counsel refused to go to trial); *Chira v. Lockheed Aircraft Corp., supra* (Dismissal for noncompliance with a pretrial order and because counsel demonstrated complete intransigence in the face of clear court orders); *Edsall v. Penn Central Transportation Co., supra* (Dismissal for violation of a court order to try the

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[5] James A. Kegley formerly acted as counsel to Respondents. He left the law firm of Gess, Mattingly, Saunier & Atchison to join the firm of Greenebaum, Doll & McDonald. It should be noted that counsel to the Petitioner, Weleken Himmelfarb & Co., are members of Mr. Kegley's new firm.

case); *Nat. Hockey League v. Metro Hockey Club,* 427 U.S. 639 (1976) (Dismissal for failure to comply with court's discovery order); *Lyell Theater Corp. v. Loews Corp.,* 682 F.2d 37 (2nd Cir. 1982) (Dismissal because of several failures of counsel to obey court orders).

The Sixth Circuit Court of Appeals did not substitute its judgment with regard to the evaluation or assessment of the essential facts of the case. The Sixth Circuit merely instructed the district court to follow the law governing a Rule 41(b) dismissal indicating that the sanction was an extreme and rare one which should not be used when lesser sanctions are available that would be equally as effective.

The Court of Appeals recognized that the case involved competing equities and this was proper.

The Sixth Circuit concluded that Respondents' counsel spent a considerable amount of time on the case and was chargeable with excusable neglect only with regard to the securing of deposition transcripts. This conclusion is not inconsistent with the district court's decision and findings of fact.

The Sixth Circuit determined that dismissal would accomplish nothing because a new class would surely assert its rights in a new cause of action notwithstanding potential statute of limitations problems. A new class could withstand attack based on statute of limitations arguments pursuant to the tolling doctrine articulated by this Court in *American Pipe and Construction Co. v. Utah,* 94 S.Ct. 756 (1974). It was in this case that this Court held that a commencement of a class action suspends the applicable statute of limitations as to all asserted

members of the class who would have been parties had the suit been permitted to continue as a class action. This tolling principle was reaffirmed by this Court in *Crown, Cork and Seal Co., Inc. v. Parker,* 103 S.Ct. 2392 (1983) and again in *Chardon v. Soto,* 103 S.Ct. 2611 (1983). The Sixth Circuit correctly perceived that the Petitioners would only suffer more prejudice if the case were dismissed, not less. This is so because this litigation will not be terminated by dismissal, it will just begin anew.

In an unseemly attempt to create arguments for review by this Court, Petitioners have made several incorrect statements in their request for a writ of certiorari. The Sixth Circuit did not ignore the conduct of Respondents' counsel. Rather than substitute its own judgment, it did agree with the district court's characterization of the conduct of Respondents' counsel. The Petitioners are incorrect in stating that Judge Allen concluded that the Respondents' counsel did not spend a substantial amount of time on the case. Careful examination of Judge Allen's decision reveals that he did not so conclude. The Sixth Circuit did not hold that the Respondents could not be held responsible for the conduct of their chosen counsel. A careful reading of the decision of the Sixth Circuit does not lead one to such a holding.

The decision of the Sixth Circuit is completely consistent with this court's definitive analysis of Rule 41(b) in *Link v. Wabash R.R. Co., supra.* Moreover, it is clear that this Court's guidance in *Link* is sufficient for Rule 41(b) dismissals. Petitioners have made no compelling arguments to the contrary. Notwithstanding Petitioners' statements in their Petition, the Sixth Circuit did not determine that delays by Respondents' counsel were ex-

cusable and should not be attributed to the individual Respondent, Julia V. Sparrow Holt (Atchison). There is no language anywhere in the decision that could be interpreted as support for Petitioners' assertion. The Sixth Circuit referred only to the efforts to secure depositions when it categorized the conduct of counsel as "excusable neglect."

The decision of the Sixth Circuit is also in accord with the decisions of this court in *National Hockey League v. Metropolitan Hockey, Inc., supra* and *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980). Although neither of these cases is directly in point because they involve Rules 37 and 54(b) respectively, they are relevant by analogy. This Court in *National Hockey League* indicated that the question, of course, is not whether this Court, or whether a court of appeals, would as an original matter have dismissed the action, but is whether the district court abused its discretion in so doing. This Court in *National Hockey League* also held that the district court must consider the entire record. The Sixth Circuit correctly applied the abuse of discretion standard because it noted that the district court did not explore all the alternatives to dismissal. This court in *Curtiss-Wright Corp.* determined that the standard of review granting a Rule 54(b) dismissal is whether or not the dismissal is in the interests of sound judicial administration. The Sixth Circuit correctly determined that the district court's dismissal was not in the interests of sound judicial administration because dismissal would not have accomplished anything. Dismissal would result in more delay and all the substantial effort to date in the litigation would be wasted. Such a waste is not consistent with efficient judicial administration.

The Petitioners misinterpret the law stated in *Carter v. City of Memphis, supra* and *Edsall v. Penn Central Transportation, Co., supra.* These decisions do not stand for a no-fault rule in favor of clients when faced with a dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. In *Carter* the court cited *five* reasons for overturning the dismissal: (1) both attorneys were at fault, (2) the defendant was not prejudiced, (3) there was no indication that plaintiff's counsel would not have been ready for trial, (4) plaintiff's counsel had filed pleadings indicating his position, and (5) plaintiff was totally blameless. The decision did not turn on the responsibility of a plaintiff for the acts of his lawyer-agent. As noted *supra, Edsall* is materially different because counsel's conduct involved a direct violation of a court order. Nonetheless, the court properly held that the interests of justice sometimes require a finding of abuse of discretion because the balance of equities results in a conclusion that the injured party should be given his day in court. The Sixth Circuit likewise struck such a balance.

There is no authority and the Petitioners cite none for their proposition that "whereas, in other circuits a Rule 41(b) dismissal for failure to prosecute is generally upheld, the Sixth Circuit has consistently reversed Rule 41(b) dismissals granted for this reason." (*See* Petitioners' Petition at 30.)

Notwithstanding Petitioners' arguments in their Petition, the Sixth Circuit did not excuse the conduct of counsel on the basis that it was attributable in major part to commitment to other cases. There is no language in the Sixth Circuit's decision to support this argument.

The case before the court does not present any compelling reasons for review because the Sixth Circuit decision is not in conflict with the law of other circuits, because the Sixth Circuit's decision does not demonstrate unacceptable conduct requiring this Court's supervision, and because it is in full compliance with this Court's guidance on Rule 41(b) dismissals.

CONCLUSION

On the basis of the foregoing the Petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

WELENKEN HIMMELFARB & CO. PETITIONERS
WHAYNE HOUGLAND

v.

JULIA V. SPARROW HOLT (ATCHISON)
ON BEHALF OF HERSELF AND ALL
OTHERS SIMILARLY SITUATED RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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June 5, 1985

21pp

QUESTIONS PRESENTED

1. Whether the Sixth Circuit may substitute its judgment for that of the District Court in considering the propriety of a Rule 41(b) dismissal?

2. In view of the congested dockets of the federal courts in general, and the conflict that now exists among the circuits with respect to utilizing dismissal as a sanction, should this Court establish guidelines for the dismissal of actions under Rule 41(b) for failure to prosecute actions diligently?

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FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure Rule 41(b):

Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him . . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

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No. _____

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BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

Respondents, PHILIP G. HERSHBERGER, MARK DEVELOPMENT COMPANY, BARNEY A. TUCKER, and THOMAS SMITH BORDERS, respectfully submit the following Brief in Response and in Support of the Petition

for Certiorari filed by Petitioners, WELENKEN HIMMELFARB & CO. and WHAYNE HOUGLAND.

STATEMENT OF THE CASE

Respondents, PHILIP G. HERSHBERGER, MARK DEVELOPMENT COMPANY, BARNEY A. TUCKER, and THOMAS SMITH BORDERS, adopt in whole the Statement of the Case presented in the Petition for Certiorari on Pages 1 through 14 and incorporate the same by reference as if fully set out herein.

REASONS FOR GRANTING THE WRIT

The sanction of dismissal for failure to prosecute under Rule 41(b) is no longer available to the District Courts of the Sixth Circuit as a result of the decision below.

Respondents submit that this fact provides the most compelling reason for granting the Petition for Writ of Certiorari filed by Petitioners, WELENKEN HIMMELFARB & CO. and WHAYNE HOUGLAND.

This statement regarding the state of law of the Sixth Circuit subsequent to this decision is not an exaggeration. If a District Court is not entitled to dismiss an action pending for eleven years as a result of four years and ten months of unreasonable delays, attributable solely to the Plaintiff, Petition, Appendix B, p. 10, then no action may properly be dismissed under Rule 41(b) in the Sixth Circuit.

This Court should seize the opportunity to clarify the District Court's discretionary authority to dismiss an action for failure to prosecute, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Both the propriety of, and standards for, dismissal are currently in disarray. By granting the Writ, this Court can resolve this conflict and confusion within the Federal judiciary. Additionally, it can also clarify the

standard of review by which such dismissals are judged.

A definitive ruling from this Court will once again allow the District Court to confidently wield the sword of dismissal as a sanction against dilatory conduct. Dismissal can again become an effective deterrent to parties and their counsel who would allow their cases to languish on an already overloaded Federal docket.

As this Court has already recognized, it is well within the discretion of a Trial Court to dismiss an action, sua sponte, for failure to prosecute. Link v. Wabash R.R. Co., 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962). It is axiomatic that such a discretionary act can only be overturned for abuse.

In the present case, the Sixth Circuit ignored this fundamental principle and instead superimposed its own hind-

sight-enhanced judgment upon that of the District Court. Rather than considering whether discretion was abused, the Sixth Circuit uttered a litany of platitudes which send a clear message to the District Courts commanding them to avoid dismissal as a sanction. To the Sixth Circuit dismissal is a sanction which "should be invoked only rarely". Petition, Appendix A, p. 3. It should only be used when no less powerful or ultimate sanction is available. The Sixth Circuit considers the sanction a last resort which obligates it "to scrutinize dismissals with the utmost care". Petition, Appendix A, p. 4. Nowhere in the opinion is there any recognition of the proper standard of review.

This improper review dramatically conflicts with this Court's mandate regarding similar dismissal, pursuant to Rule 37, announced in National Hockey

League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 49 L.Ed.2d 747, 96 S.Ct. 2778 (1976) and reaffirmed in Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxite De Guinea, 456 U.S. 694, 72 L.Ed.2d 492, 102 S.Ct. 2099 (1982). Simply put, the question is not whether the reviewing Court would, as an original matter, have applied the sanction but, instead, whether the District Court abused its discretion in doing so.

Even a facial review of the Sixth Circuit's opinion demonstrates that it failed to make this most basic inquiry. Instead of asking whether the District Court abused its discretion in ordering dismissal, the Sixth Circuit asks whether it would have, as an original matter, ordered the dismissal. The Court's opinion conducts a superficial review of the record and then supplants its own judgment for that of the District Court,

vitiating the District Court's discretion.

No rational basis exists for any variance between the standard of review for a dismissal pursuant to Rule 37 and a dismissal pursuant to Rule 41. Thus, the Sixth Circuit's failure to apply the proper standard of review creates a repugnant discrepancy between dismissals ordered pursuant to Rule 37 and Rule 41, which must be corrected.

This Court should also grant the Petition for Writ of Certiorari due to the current conflict between the circuits concerning dismissals pursuant to Rule 41(b). In addition to the inter-circuit conflicts listed in the Petition for Writ of Certiorari, on pages 30 through 34, the Sixth Circuit's reversal of the District Court's dismissal conflicts with decisions of other circuits, which clearly recognize that dismissals may only be reversed for an abuse of discretion.

The scope of review utilized by the Sixth Circuit is in direct conflict with the following decisions by other circuit courts, which plainly hold that a dismissal pursuant to Rule 41(b) is a matter committed to the sound discretion of the District Court. As such, its decision should be upheld unless that discretion has been abused. Damiani v. Rhode Island Hospital, 704 F.2d 12 (1st Cir., 1983); Harding v. Federal Reserve Bank of New York, 707 F.2d 46 (2nd Cir., 1983); Dyotherm Corp. v. Turbo Machine Corp., 392 F.2d 146 (3rd Cir., 1968); Hepperle v. Johnston, 590 F.2d 609 (5th Cir., 1979); Tinkoff v. Jarecki, 208 F.2d 861 (7th Cir., 1953); Fendler v. Westgate-California Corporation, 527 F.2d 1168 (9th Cir., 1975).

The most glaring conflict exists between the First Circuit and the Sixth Circuit. In Damiani v. Rhode Island

Hospital, supra, the First Circuit upheld the dismissal pursuant to Rule 37(b)(2). In so doing, that Court stated:

> "This circuit has long recognized that dismissal either for failure to comply with discovery orders or lack of prosecution is a matter within the discretion of the district court and the claim of abusive discretion has not received a sympathetic ear from us. In fact, since 1967 we have upheld dismissals in all cases but one." (Citations omitted.) 704 F.2d at 17. (Emphasis supplied.)

Unlike the Sixth Circuit, the First Circuit also rejects the argument that the client should not be responsible for the dilatory tactics of his lawyers relying upon guidance from this Court's decisions in Smith v. Ayer, 101 U.S. 320, 25 L.Ed 955 (1880) and Link v. Wabash R.R. Co., supra.

The disparate treatment received by a dismissal, on appeal, in the First Circuit and in the Sixth Circuit is the difference between night and day. This lack of uniformity in appellate review "is a hydra

in government, from which nothing but contradiction and confusion can proceed."[1] Such disparity requires this Court's intervention to define the role of the District Court and to clarify the standard of review of the Appellate Court with regard to Rule 41(b) dismissals. The case before this Court, presents a unique opportunity for the Court to intervene and resolve the conflict.

The District Courts are currently faced with the prejudicial effect of dilatory practices, delayed justice, and the consequential loss of respect for the Federal judiciary. Rule 41(b) was designed in recognition of the inherent power of a Court to levy sanctions in response to abusive litigation practices. Roadway Express, Inc. v. Piper, 447 U.S.

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[1] A. Hamilton, The Federalist, No. 80, reprinted in Schaefer Reducing Circuit Conflicts, 69 A.B.A.J. 453, April, 1983, p. 454.

752, 65 L.Ed.2d 488, 100 S.Ct. 2455 (1980); Link v. Wabash R.R. Co., supra. However, where the District Court does not have clear guidelines and if its decision is subject to de novo review, its inherent power, as well as its power pursuant to Rule 41(b), becomes an illusion.

The District Courts need a deterrent to counsel who would harbor dilatory motives or create delay by lack of diligence.[2] From 1960 to 1983, the number of civil filings in the United States District Courts increased by a staggering 300

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[2]Chief Justice Burger, in discussing the new sanctions available under the 1983 amendments to the Federal Rules of Civil Procedure has stated:

> Yes, these sanctions serve a useful purpose if they are used with care. They are one way to remind some members of the profession that as officers of the court they have an obligation to the public and to the courts as well as to their clients.

Q & A with the Chief Justice, A.B.A.J., January, 1985, p. 91, 94.

Per Cent.[3] With this remarkable increase in federal litigation, unprosecuted actions languishing on the district court docket only clog the judicial mechanisms, resulting in undue delays to the majority of counsel who diligently prosecute actions entrusted to their care.

In the Sixth Circuit, the real judicial decision-making, pursuant to Rule 41(b), is conducted by the Appellate Court. Unless the District Courts can be assured that their findings will be respected and that their discretion will be accorded proper deference, they will have no power to dismiss or manage their own dockets. This Court can give this assurance and power by granting the Writ.

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[3] In 1960, approximately 60,000 cases were filed compared with 240,000 in 1983. Stewart, Supreme Court Report, A.B.A.J., February, 1985, p. 110.

CONCLUSION

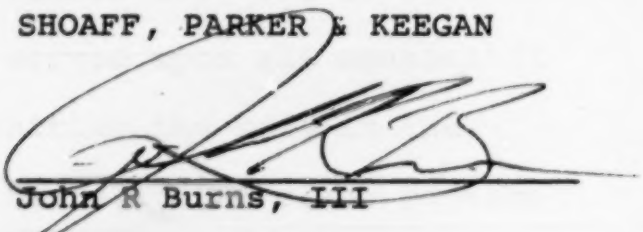
The overburdened Federal judiciary needs to have an effective weapon to combat dilatory litigation practices. Trial Rule 41(b) was designed to be that weapon. The usefulness of Rule 41(b) is emasculated when the Sixth Circuit substitutes its judgment of the District Court that was in the best position to judge the sincerity and deportment of both counsel and parties litgant.

This emasculation exacerbates current conflict within the circuits. The action taken by the Sixth Circuit demonstrates the need to clarify both the Trial Court's ability to dismiss an action for failure to prosecute and the proper standard of review for such a sanction. For the

reasons discussed above, this Court should grant the Writ of Certiorari requested by Petitioners.

Respectfully submitted,

SHOAFF, PARKER & KEEGAN



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Brief in Response to Petition for Writ of Certiorari has been served upon all counsel of record by depositing the same in the United States Mails, first class postage prepaid, addressed to said counsel at their last-known address, this 5th day of June, 1985.

SHOAFF, PARKER & KEEGAN

By _____
John R Burns, III